

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY B. WALKER,

Defendant and Appellant.

A111303

(Marin County  
Super. Ct. No. SC140019A)

**I. INTRODUCTION**

Pursuant to a plea agreement, appellant pled guilty to eight counts of a fourteen-count complaint alleging both residential and commercial burglary, receiving stolen property, grand theft of personal property, and other related offenses. The trial court sentenced appellant to the three-year upper term on one of the receiving stolen property counts and two-year midterms (albeit with 16 months stayed on each) on each of the remaining counts to which appellant had pled guilty, the terms to be served consecutively. The total prison term to which appellant was sentenced was seven years and eight months. Appellant timely appealed and claims sentencing error, abuse of discretion in imposition of the consecutive terms, and ineffective assistance of counsel at the sentencing hearing. We disagree with these contentions and hence affirm.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Between January 17 and 28, 2005,<sup>1</sup> five residents of Mill Valley and Corte Madera, Marin County, reported that someone had stolen various items, including credit cards, laptop computers, clothes, champagne, compact discs, etc., from their cars. The following month, a sixth victim learned through his credit card company that his wallet, including his credit card, had been stolen from his car. On February 4, appellant used one of the stolen credit cards to buy numerous items from stores in Marin County.

Three days later, during the early morning hours of February 7, a Mill Valley resident saw someone dressed in dark clothing looking into a car with a flashlight; the person then fled in another car. The suspect, appellant, was later captured by deputy sheriffs. In his car, the officers found a victim's wallet, numerous credit cards, other items coming from victims' wallets, stereo equipment, champagne, power tools, and other reportedly stolen items. A search of appellant's room in a San Francisco motel resulted in the recovery of other reportedly stolen items. Appellant showed the officers other locations where he had entered cars and stolen property, and confessed to having an addiction to methamphetamine.

Two days later, on February 9, the Marin County District Attorney filed a 14-count complaint against appellant. The 14 counts included one for residential burglary (Pen. Code, §§ 459, 1192.7, subd. (c)(18), 462, subd. (a), 1170.12, subds. (a)-(c)),<sup>2</sup> five counts of receiving stolen property (§ 496, subd. (a)), two counts of grand theft of personal property (§ 487, subd. (a)), four counts of commercial burglary (§ 459), one count of prowling (§ 647, subd. (h)), and one count of possession of burglary tools (§ 466). The complaint further alleged, as to its first 12 counts, that appellant had suffered a felony conviction resulting in a prison term within the previous five years. (§ 667.5.)

---

<sup>1</sup> All further dates noted are in 2005.

<sup>2</sup> Unless otherwise noted, all further statutory references are to the Penal Code.

On March 30, appellant pled guilty to eight of the fourteen counts, including three counts of receiving stolen property, one count of grand theft of personal property, and four counts of commercial burglary. In exchange, the remaining counts and the prior prison term allegation were dismissed. In the process, the court advised appellant that he could face a maximum term of seven years and eight months in state prison.

On July 15, the trial court sentenced appellant to that term. It was, as noted earlier, composed of the three-year upper term on count two, one of the counts charging receipt of stolen property, and the two-year midterm, to be served consecutively, for each of the remaining seven counts to which appellant had pled—albeit with 16 months stayed on each such consecutive term.

Appellant filed a timely notice of appeal. However, no certificate of probable cause (see § 1237.5 and Cal. Rules of Court, rule 30(b)<sup>3</sup>) was either sought or obtained.

### **III. DISCUSSION.**

Appellant advances several contentions, which we will address in the order to be noted. He argues that: (1) the trial court erred in imposing the upper term on one of the section 496, subdivision (a) (§ 496(a)), counts and consecutive terms on the remaining relevant counts because, in so doing, it necessarily considered dismissed counts without having secured a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) or used the same facts to both impose the upper term *and* the consecutive terms, in violation of section 1170, subdivision (b); (2) the trial court abused its discretion in imposing the consecutive terms; and (3) appellant suffered from ineffective assistance of counsel in view of that counsel's failure to object to several of the court's alleged errors at his sentencing hearing.

Appellant's first point has two apparently alternative parts. The first is that the court erred in considering the six dismissed counts in imposing the upper term for one of the section 496(a) counts because it did not get a *Harvey* waiver from appellant or his

---

<sup>3</sup> All further references to rules are to the California Rules of Court.

counsel. This factual premise is correct, but the conclusion appellant would have us draw from it is not.

It is true that the prosecutor did not ask for, and the trial court did not note, that there had been a “*Harvey* waiver” from appellant or his counsel at the sentencing hearing; indeed, appellant’s counsel noted the absence of such in connection with the dismissal of the one residential burglary count. But the trial court nowhere indicated it was relying on any of the dismissed counts in selecting the upper term for the sentence it imposed for count two. It said in this regard: “The aggravated term is clearly appropriate in view of the multiplicity of offenses and your bad record and the fact that you were on parole at the time of committing these new offenses.” The court thus gave *three reasons* for selecting the aggravated term, none of them specifying the dismissed charges. Indeed, even the “multiplicity of offenses” phraseology does not trigger *Harvey* problems, because a court could well have meant the eight admitted charges, and it clearly may rely upon the numerosity of those charges in selecting the upper term. (See, e.g., *People v. Miranda* (1987) 196 Cal.App.3d 1000, 1003.) Further, and as the applicable court rule makes clear, a sentencing court may properly consider as aggravating factors a defendant’s “prior convictions as an adult,” his service of a “prior prison term,” and the fact that he was on “parole when the crime was committed.” (Rule 4.421 (b) (2), (3) and (4).) As our colleagues in Division Four of this district have held: “A case will not be remanded for resentencing based on the use of an invalid factor if the superior court’s remarks indicate a strong belief that the upper term was proper *and other factors were mentioned.*” (*People v. Clark* (1992) 12 Cal.App.4th 663, 667, emphasis supplied.) And, as numerous cases have held: “A single factor in aggravation will support imposition of an upper term.” (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also, to the same effect, *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360, and cases cited therein.)

As noted above, interpreting, as we must, the trial court’s reference to appellant’s “multiplicity of offenses” as neither meaning nor including the dismissed counts, the court thus mentioned three distinct, and valid, bases for imposing the upper term.

Apparently as an alternate to the *Harvey* error argument, appellant next contends that the court erred in relying on the same single factor (“multiplicity of offenses”) to both impose the upper term *and* a consecutive sentence for count two, something expressly not permitted by section 1170, subdivision (b). It appears the court did so (id. at p. 33), but any such error was harmless in view of the court’s express mention of two other factors upon which the upper term for that count could be based. As our Supreme Court held in *People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*): “[N]o prejudice appears. ‘Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’” [Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]. In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so. Resentencing is not required.”

Here, in view of the court’s specific citation of *three* separate and distinct factors in its sentencing ruling, the same principle applies here.

Appellant’s next contention is that the trial court abused its discretion in sentencing him to consecutive terms, because his various offenses did not meet the standard set forth in rule 4.425(a), which provides that, among the relevant criteria “affecting the decision to impose consecutive rather than concurrent sentences,” is the fact that “(3) [t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place so as to indicate a single period of aberrant behavior.” (Rule 4.425(a)(3).) Citing Justice Kennard’s dissenting opinion in *People v. Lawrence* (2000) 24 Cal.4th 219, 240 (*Lawrence*), appellant argues that the offenses in question all occurred “during a brief two-to-three week period for the purpose of collecting items of monetary value” and hence “were committed with a single objective during a ‘single period of aberrant behavior.’”

This argument simply does not hold water. In the first place, *Lawrence* did not involve a sentence under rule 4.425(a) and hence nothing in it—and particularly not in a dissenting opinion—is relevant to the issue before us here. And there are numerous cases holding that, even in time and locale contexts more condensed than here, consecutive sentences are permissible under that rule. For our purposes, the most significant of those prior decisions is one authored by Presiding Justice Kline of this court, *People v. Martin* (1992) 3 Cal.App.4th 482. There, appellant was sentenced to consecutive terms after pleading no contest to charges of burglary, petty theft, etc., contained in charging pleadings in three separate cases. He maintained that the trial court erred in imposing consecutive sentences under the predecessor rule to the present rule 4.425(a)(3), arguing that “the offenses occurred within ‘a very short time of each other.’” (*Id.* at p. 489.) We rejected that argument even as to the offenses contained in two of the complaints, all of which occurred in the same city (Vallejo) and on the same day (May 7, 1991). We held: “Appellant urges that the three offenses in No. A054173 and No. A054172 were all committed on the same day, within a short time of each other, in the same general area, for the purpose of obtaining alcohol and while appellant was intoxicated. Rule 425(a)(3), lists as one of the criteria affecting the decision to impose consecutive sentences that ‘[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.’ Appellant maintains the offenses fall within the italicized language. [¶] Appellant cites no support for his statement that the offenses occurred within ‘a very short time of each other’: While the probation report in No. A054372 makes clear that the burglary was perpetrated before noon on May 7, the report in No. A054373 does not state what time of day the offenses were committed. Even the offenses in No. A054373—the robbery of Russell and burglary of appellant’s mother’s home—were separated by appellant’s travel to Fairfield to pick up a companion and return to Vallejo. The two burglaries and the robbery were each committed at a different location against a different victim. . . . The court did not abuse its discretion in failing to find a ‘single

period of aberrant behavior.’” (*Id.* at pp. 489-490, italics omitted; see also, to the same effect, *People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.)

Here, the commercial burglaries and receipt of stolen property offenses to which appellant pled guilty occurred over a period of 11 days in January and in two towns in Marin County, Mill Valley and Corte Madera. Further, on February 4, when appellant used one of the stolen credit cards, he did so in three towns in Marin, Corte Madera, Sausalito, and Larkspur. Clearly, the court did not abuse its discretion in ordering consecutive sentences under rule 4.425(a).

Finally, appellant urges that he was prejudiced by ineffective assistance of trial counsel, specifically that counsel’s failure to object at the sentencing hearing “to the court’s improper consideration of dismissed charges, and (2) improper use of dual facts to impose the upper term and consecutive terms.” Neither point has merit. In the first place, and as previously noted, there is nothing in the record establishing that the trial court relied on any of the dismissed counts—as distinguished from the eight counts to which appellant had pled guilty—when it used the phrase “multiplicity of offenses” at the sentencing hearing. Second, as also noted above, under the directly-applicable holding in *Osband*, there was no prejudicial error in the court’s citation of the same factor to justify both the upper term and a consecutive sentence. (See *Osband, supra*, 13 Cal.4th at pp. 728-729, quoted *ante*.)

#### **IV. DISPOSITION**

The judgment is affirmed.

---

Haerle, J.

We concur:

---

Kline, P.J.

---

Richman, J.